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No. 87-351

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE STEARNS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of a federal court of appeals, which applied the Kentucky state law of mineral conveyances, should be reconsidered in light of a recent decision of the Kentucky Supreme Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is reported at 816 F.2d 279. The opinion of the district court (Pet. App. 13a-24a) is reported at 595 F. Supp. 808.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1987. Rehearing was denied on June 2, 1987 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

In 1937, petitioner sold the United States several tracts of land in Wayne and McCreary Counties, Kentucky, reserving certain mineral rights in the land. Petitioner now claims that the reservation of mineral rights entitles it to strip mine coal on one of the tracts. Pet. App. 14a. Both courts below rejected this reading of petitioner's deed,

holding that the "surface rights of the United States in the [1937] deed * * * are superior" to petitioner's mineral rights (*id.* at 12a). The question in this case is whether the holding below should be reconsidered in light of a subsequent decision of the Kentucky Supreme Court concerning the proper interpretation of so-called "broad form" deeds.

1. In 1937, petitioner sold the United States 46,842.4 acres of land for inclusion in the Daniel Boone National Forest (Pet. App. 14a). Petitioner's 1937 deed reserved coal and other specified minerals to itself as grantor, but expressly required that the mining and removal of such minerals comply with certain rules prescribed by the Secretary of Agriculture, which were written into the deed (Pet. 7-8; Pet. App. 4a-6a).[1] These rules explicitly forbade hydraulic mining, but were silent about the permissibility of strip mining of surface coal by nonhydraulic, mechanical means.[2] In 1955, the Secretary of Agriculture denied petitioner's request for permission to strip mine the tracts (Pet. App. 3a, 14a). The Forest Service subsequently denied a renewed request, explaining both that petitioner

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[1] Section 9 of the Weeks Act of 1911, 16 U.S.C. 518, directs that "reservations retained by the owner from whom the United States receives title * * * shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and [that] such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States * * *."

[2] Among other things, the rules and regulations of the Secretary reproduced in the deed provide (Pet. App. 5a-6a) that, "[i]n prospecting for, and in mining and removing minerals, oil, or gas * * * only so much of the surface shall be occupied, used or disturbed as in [*sic*] reasonable and, according to recognized good practice, necessary for the purpose," and that, "[i]n underground operations all reasonable and usual provisions shall be made for the support of the surface, and to that end the tunnels, shafts, and other workings shall at all reasonable times be open to inspection and examination by the forest officers and mining experts or inspectors of the United States."

lacked any legal right to strip mine under its 1937 deed reservation and that the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, forbade such mining on national forest land (Pet. App. 3a, 14a-15a).

In 1978, after obtaining a state permit to surface mine a 19-acre tract of the deeded land, petitioner commenced this action in the United States District Court for the Eastern District of Kentucky. It sought a declaration that it could strip mine the 19-acre tract by virtue of the 1937 deed reservation.[3] Petitioner's suit was consolidated with a later suit by the United States for a declaration of the respective rights of the parties under the 1937 deed. Pet. App. 4a, 15a. Since the United States was plaintiff in its separate suit, the jurisdiction of the district court to adjudicate these respective rights was predicated on 28 U.S.C. 1345 (Pet. App. 4a n.1).

Applying the common law of Kentucky, as reflected in the decisions of state appellate courts, the district court concluded that the 1937 deed did not accord petitioner the right to strip mine. The court found it apparent "from all the language in the deed[,] that the parties did not intend that [petitioner] would have superior rights to extract the minerals over the surface rights of the government." The court therefore held that "the surface rights of the United States in the deed involved are superior to the mineral rights of [petitioner], so [petitioner] cannot engage in surface mining on the property listed in the deed involved

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[3] Petitioner states that "much of the coal retained by Stearns can be removed *only* by surface mining methods" (Pet. 8 (emphasis in original)). Neither the pleadings nor the proof, however, addressed the question whether the coal was recoverable solely through surface mining methods.

without approval from the United States." Pet. App. 23a-24a.[4]

2. On petitioner's appeal, the court of appeals affirmed, holding that petitioner "as owner of the mineral estate did not retain rights superior to any conveyed to the United States as surface owner" (Pet. App. 9a). Citing Kentucky state court decisions, the court of appeals explained that in cases involving so-called "broad form" deeds, which permit "the mineral owner [to] mine virtually without limitation," "the surface estate has been held subservient to the dominant estate of the mineral holder" (*id.* at 6a).[5] The court noted, however, that the 1937

[4] Alternatively, the district court held that petitioner's claim failed under Ky. Rev. Stat Ann. §§ 381.930-381.945 (Michie/Bobbs-Merrill (Supp. 1986)), which took effect on July 13, 1984. That legislation's declared intent was to "codify a rule of construction for mineral deeds relating to coal extraction" (*id.* § 381.930(6)); the statute was to govern any preexisting or future "instrument * * * purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals" (*id.* § 381.940). For those instruments that failed to specify the method of coal extraction, the parties to the instrument would be deemed to have intended "that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate only for the purposes of coal extraction by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed." *Id.* § 381.940. The district court noted that the statute had been challenged as inconsistent with the Kentucky state constitution, and the court accordingly premised its holding both on the statute *and*, independently, on state common law (Pet. App. 20a). The statute was in fact subsequently struck down under the Kentucky State Constitution. *Akers* v. *Baldwin*, No. 85-SC-392-CL (Ky. July 2, 1987).

[5] As later described by the Kentucky Supreme Court (Pet. App. 30a-31a, reprinting *Akers* v. *Baldwin*, No. 85-SC-392-CL (July 2, 1987)), the term "broad form" generally characterizes a deed that "has a long and tedious description of granted rights as opposed to those mineral deeds which grant only necessary and convenient mining

deed at issue in this case—which places a number of express conditions on petitioner's mineral rights—is *not* a broad form deed (see *id.* at 8a-9a). Relying on *Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. Ct. App. 1968), and *Commerce Union Bank* v. *Kinkade*, 540 S.W.2d 861 (Ky. 1976), cert. denied, 430 U.S. 915 (1977), the court concluded that the proper interpretation of such narrower deeds turns on "whether the parties 'intended that the mineral owner's rights to use the surface in removal of minerals would be superior to any competing right of the surface owner' " (Pet. App. 8a (citation omitted)). And here, the court held that, "[s]ince some rights were preserved in the surface owner, it follows *a fortiori* that [petitioner] as owner of the mineral estate did not retain rights superior to any conveyed to the United States as surface owner" (*id.* at 9a).[6]

3. One month after the court of appeals denied rehearing in this case, the Kentucky Supreme Court issued an opinion in *Akers* v. *Baldwin*, No. 85-SC-392-CL (July 2, 1987) (*reprinted in* Pet. App. 25a-80a), which "consider[ed] the legal effect of the so-called 'broad form deeds' on the conflicting rights of the owners of the sur-

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rights, or no mining rights at all"; that "normally conveys all of the minerals under the surface," although it may "list only certain specific substances"; that assures the owner of the mineral estate surface rights he "deems necessary or convenient for the full and free exercise and enjoyment of the minerals conveyed"; that usually contains "an express waiver of liability for damages arising from the * * * use of the surface to obtain the minerals"; and that leaves to the owner of the surface estate "only such surface rights as may be consistent with the mineral rights conveyed."

[6] Alternatively, the court of appeals affirmed the district court's ruling that petitioner's claim would fail under Ky. Rev. Stat. Ann. § 381.940 (Michie/Bobbs-Merrill (Supp. 1986)) (Pet. App. 11a) (see note 4, *supra*). But recognizing that the statute might be held unconstitutional, the court of appeals "adhere[d] to [its] holding affirming the district court based upon the common law of Kentucky" (Pet. App. 10a).

face to land and the owners of the mineral rights under that land" (Pet. App. 26a). In *Akers*, the Kentucky court reaffirmed its prior decision in *Buchanan* v. *Watson*, 290 S.W.2d 40 (Ky. Ct. App. 1956), holding that "the owner of mineral rights under a broad form deed may use the surface—all of it—to acquire the minerals lying thereunder. The only restriction (unless one appears in the deed) is that the use of said surface may not be oppressive, arbitrary, malicious or wanton" (Pet. App. 46a). The court accordingly held that a person holding mineral rights under a broad form deed may strip mine the surface, although he may have to pay damages to the owner (see *id.* at 48a).

ARGUMENT

This Court generally does not review, "save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Instead, this Court typically defers to the "federal judges who deal regularly with questions of state law in their respective districts and circuits[,who] are in a better position * * * to determine how local courts would dispose of comparable issues." *Butner* v. *United States*, 440 U.S. 48, 58 (1979). Here, petitioner seeks a departure from this principle because, it claims, the decision below is inconsistent with the Kentucky Supreme Court's subsequent decision in *Akers*.[7]

We agree, of course, that an intervening state court decision may present grounds for reconsideration of a

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[7] Petitioner also suggests (Pet. 22-23) that the decision below is somehow inconsistent with unspecified portions of the Weeks Act of 1911, 16 U.S.C. 480, 500, 515-517, 517a, 518-519, 520, 521, 552, 563. Petitioner fails to explain how this is so, however, and its Weeks Act argument is not, in any event, submitted as part of the questions presented in the petition (see Pet. i).

federal ruling that turns on an application of state law. See, *e.g., Huddleston,* 322 U.S. at 237-238 (vacating the judgment of a federal court of appeals and remanding with instructions to reconsider the case in light of an intervening state court decision). Here, however, petitioner's argument turns on a plain misreading of *Akers.* By its terms, *Akers* states a rule of construction that governs only broad form deeds. In stating the issue on appeal, the *Akers* court explained that it was "consider[ing] the legal effect of the so-called '*broad form deeds*' " (Pet. App. 26a (emphasis added)); in stating its holding, the court addressed the status of "the owner of mineral rights under a *broad form deed*" (*id.* at 46a (emphasis added)). And throughout its opinion, the court made it clear that it was addressing doctrine only as it related to broad form deeds (see, *e.g., id.* at 26a, 30a, 35a, 36a, 37a, 40a, 45a, 48a, 51a-52a).

Here, in contrast, the parties agreed below that the 1937 deed is *not* of the broad form type (see Pet. App. 21a). That fact was crucial to the court of appeals' decision (see *id.* at 7a-9a). Indeed, the court below made clear that, under *Buchanan* v. *Watson, supra* (the Kentucky Supreme Court decision that was reaffirmed by *Akers*), petitioner would have prevailed had this case involved a broad form deed (see Pet. App. 6a). *Akers* therefore is wholly inapposite here.

Petitioner nevertheless contends (Pet. 17-18) that *Akers* eliminated the distinction between broad form and more narrowly worded deeds by overruling *Commerce Union Bank* v. *Kinkade, supra,* a decision upon which the court below in part relied. Again, this argument turns on a plain misreading of *Akers. Akers* described, with apparent approval, *Commerce Union Bank's* holding that non-broad form deeds do *not* reserve the mineral owner's right to strip mine. At the same time, the *Akers* court noted that *Commerce Union Bank* appeared to reaffirm the rule that broad form deeds preserve the right to strip mine. *Akers*

then concluded its discussion by stating that, "[t]o the extent *Commerce Union* is inconsistent with the present opinion, *Commerce Union* is overruled." Pet. App. 45a. In making this statement—which occurred at the conclusion of a lengthy analysis of cases dealing with broad form deeds (see *id.* at 31a-44a) and immediately prior to the court's decision to reaffirm *Buchanan's* holding "with regard to the rights of mineral owners under broad form deeds" (*id.* at 45a-46a)—the *Akers* court plainly meant only to confine *Commerce Union Bank* to cases that do not involve broad form deeds.[8] Because this case does not involve such a deed, *Commerce Union Bank* is, as the court below recognized, controlling. There accordingly is no need to require further consideration of the issue by the court of appeals in a case that has now been pending for almost ten years.

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[8] Petitioner points to the separate opinion of Justice Stephenson, who concurred and dissented, in contending that *Akers* overruled *Commerce Union Bank* (Pet. 18 n.9, citing Pet. App. 62a (opinion of Stephenson, J.)). In fact, however, Justice Stephenson took the majority to task for *not* unequivocally overruling *Commerce Union Bank* (see Pet. App. 62a).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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